No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,
Petitioner,
v.
ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC., THE AMERICAN LEGION, AMERICAN VETERANS, DISABLED AMERICAN VETERANS, MILITARY OFFICERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF COUNTY VETERANS SERVICE OFFICERS, PARALYZED VETERANS OF AMERICA, VETERANS OF FOREIGN WARS OF THE UNITED STATES, AND VIETNAM VETERANS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court should overrule *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997).

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INTEREST OF *AMICI CURIAE*[1]

Amici are several of the Nation's leading veteran-advocacy organizations. Each *amicus* has extensive experience in dealing with the Department of Veterans Affairs (VA), both in administrative proceedings and before the federal courts. This case is of interest to *amici* because its resolution will have a significant effect on their work. Given their collective wealth of experience with VA, *amici* are well-positioned to explain how *Auer* leads to agency abuses that undermine *Auer*'s own premises. And *amici* have a strong interest in ensuring that the pro-veteran canon of construction remains an important feature of statutory and regulatory interpretation.

The National Organization of Veterans' Advocates, Inc. (NOVA), is a not-for-profit educational membership organization, comprised of attorneys and other qualified members who represent our Nation's veterans and their families before VA and federal courts. NOVA works to develop high standards of service and representation for all persons seeking veterans' benefits.

The American Legion is a federally chartered veteran service organization representing nearly two million members in approximately 13,000 American Legion posts throughout the United States, its territories, and more than 20 foreign countries,

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel, any party, or any other person or entity—other than *amici curiae* and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

including England, Australia, France, Japan, Mexico and the Philippines. Since its inception in 1919, The American Legion has maintained a strong ongoing concern and commitment to veterans and their families. The American Legion helps veterans survive economic hardship, secure government benefits, and transition from military to civilian life. The American Legion drafted and obtained passage of the first G. I. Bill and has worked tirelessly for the improved subsequent versions. Additionally, The American Legion sponsors job fairs and small business summits all over the country.

American Veterans (AMVETS) is one of the largest congressionally chartered veteran service organizations and has members from each branch of the military, including the National Guard, Reserves, and Merchant Marine. AMVETS provides support for active military and all veterans in procuring their earned entitlements.

Disabled American Veterans (DAV) is a federally chartered veteran service organization, founded to serve the interests of this Nation's disabled veterans. 36 U.S.C. §§ 50301-50309. DAV has over a million members, all of whom are service-connected disabled veterans. Although DAV operates a number of charitable programs that serve the interests of its constituency, its marquee program, and the one for which it is best known, is the "National Service Program." Through that program, and from approximately one hundred locations around the United States and Puerto Rico, DAV assists veterans with their claims for benefits from VA. DAV holds power-of-attorney to represent over one million veterans before VA.

The Military Officers Association of America (MOAA) is an independent, non-profit, non-partisan organization with over 390,000 members from every branch of service—including active duty, National Guard, Reserve, retired, and former officers, as well as their families. Founded in 1929, MOAA actively advocates for compensation and benefit matters for all members of the military community.

The National Association of County Veterans Service Officers (NACVSO) is a national veteran service organization officially recognized by VA for the purpose of preparation, presentation, and prosecution of claims for benefits under laws administered by VA and the training of service officers to achieve those goals. NACVSO pursues benefits for veterans and eligible family members through education, training, and advocacy programs. These services are provided with pro bono legal representation before the agency and the Board of Veterans' Appeals. A growing organization, NACVSO has over 1,800 members in 36 states who promote the common interests of over 8 million veterans, and provides a voice on issues of national importance on veterans' benefits, including the preservation of a fair, consistent, and pro-claimant system of adjudicating claims and appeals. VA's interpretation of its regulations in a veteran-friendly manner is a matter of the utmost importance to NACVSO.

Paralyzed Veterans of America is a national, non-profit veteran service organization founded in 1946 and chartered by the Congress of the United States. *See* 36 U.S.C. §§ 170101-170111. The organization has approximately 17,000 members, each of whom is a veteran of the United States Armed Forces who lives with an injury, disease, or other dysfunction of the

spinal cord. Paralyzed Veterans of America's mission includes public education concerning the difficulties and needs of those with spinal-cord injury and dysfunction; promoting medical research and education related to injuries and diseases of the spinal cord; and legislative and legal advocacy on behalf of its members. To fulfill its mission, Paralyzed Veterans of America provides a wide array of programs and services to its members and veterans of any era, regardless of the nature of their disabilities, as well as to their families and caregivers. These include assistance and representation without charge in their pursuit of benefits and healthcare administered by VA and other federal agencies, as well as pro bono legal representation before the federal courts. Further, as an organization concerned with the civil rights of all persons with disabilities, Paralyzed Veterans of America advocates before Congress and the courts to enhance the quality of life of its members and all Americans with disabilities.

Veterans of Foreign Wars of the United States (VFW) is the Nation's oldest and largest combat veterans' organization, advocating on behalf of all veterans, and, with its Auxiliary, is comprised of nearly 1.7 million members and 2,037 skilled VA-accredited VFW representatives. The VFW's assistance extends from providing financial, social, and emotional support to members of the United States Armed Forces, veterans, and their dependents, to being leaders in the local community, and to having a direct impact on national policy.

Vietnam Veterans of America (VVA) is the only national Vietnam veterans' organization congressionally chartered and exclusively dedicated to Vietnam-era veterans and their families. VVA

assists veterans and their families, both members and non-members, in the prosecution of claims for benefits by providing them with pro bono legal representation before VA and the Board of Veterans' Appeals.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our Constitution vests "[t]he judicial power of the United States" in the Article III federal courts—and, with it, the duty "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). The Administrative Procedure Act (APA) likewise instructs federal courts to "decide all relevant questions of law," including by "determin[ing] the meaning . . . of the terms of an agency action." 5 U.S.C. § 706. The question in this case is whether—despite these clear allocations of interpretive responsibility—this Court should nonetheless give agencies the power to conclusively interpret their own ambiguous regulations.

The answer to that question is no. Forcing courts to defer to agency interpretations that the courts themselves find reasonable but *wrong* is bad law and worse policy. It violates fundamental separation-of-powers principles reflected in the Constitution and the APA, and it creates powerful incentives for bureaucrats (well-meaning or otherwise) to place their own concerns above fidelity to the rule of law. Petitioner is therefore absolutely right: *Seminole Rock* and *Auer* should be overruled.

The undersigned *amici* have decades of experience assisting our Nation's veterans in litigation before and against VA, the agency whose flawed interpretation of its own regulations gave rise to this case. We submit this *amicus* brief because our experience sheds considerable light on whether *Auer* deference makes sense. We offer two points to inform the Court's consideration of this case.

First, we highlight VA's poor track record interpreting its own statutes and regulations. A fundamental assumption of *Auer* deference is that agencies are best positioned to interpret their own regulations in a fair and predictable manner. Time and again, VA has proven that assumption wrong. The agency continually advances interpretations that violate the text and history of the relevant provisions, that exploit vagueness in VA's regulatory enactments, that are inconsistent with VA's own prior pronouncements—and that harm the veterans VA is duty-bound to protect. Indeed, our experience with VA suggests that the *Auer* doctrine makes agency rules *more* difficult to interpret and *more* difficult to predict, because the agency has less incentive to make things clear at the outset. And even when a regulatory ambiguity is genuine and unintentional, VA shows how agencies will often push the envelope and put their own interests above a faithful and impartial construction of the regulatory text. Our experience confirms that *Auer* is misguided and unworkable—and should be overruled.

Second, we ask the Court to use this case to give courts and agencies clear guidance on how they should go about interpreting regulations. Whatever the Court does with *Auer*, it should confirm that courts and agencies must interpret regulations using *all* traditional tools of construction—including not only an analysis of a regulation's text, structure, and history, but also relevant substantive and semantic canons. Most importantly for veterans, the Court should clarify that the pro-veteran canon of construction—a canon that this Court has consistently recognized for more than 75 years—fully applies to VA regulations. *See, e.g.*, *Henderson ex rel.*

Henderson v. Shinseki, 562 U.S. 428 (2011); *Boone v. Lightner*, 319 U.S. 561 (1943). Confirming the salience of that canon will help ensure that courts and VA interpret those regulations to fulfill their core purpose: to protect the men and women who have risked their lives to protect us.

ARGUMENT

I. VA'S TRACK RECORD ILLUSTRATES THE PROBLEMS WITH *AUER* DEFERENCE

The most prominent scholarly critic of *Auer* and *Seminole Rock* has explained that a key problem with those cases is that "[i]f an agency's rules mean whatever it says they mean (unless the reading is plainly erroneous), the agency" can "supply the meaning of regulatory gaps or ambiguities of its own making and [is] relieve[d] . . . of the cost of imprecision that it has produced." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996). "This state of affairs makes it that much less likely that an agency will give clear notice of its policies either to those who participate in the rulemaking process prescribed by the Administrative Procedure Act (APA) or to the regulated public." *Id.* A closely related problem is that agencies will exploit *Auer* deference to adopt interpretations that agencies themselves know are reasonable but *wrong*—a practice deeply offensive to the rule of law.

VA is the real-world embodiment of these concerns. In theory, VA should have every incentive in the world to issue clear, predictable regulations governing the availability of benefits to veterans. After all, the overwhelming majority of veterans who

try to secure benefits from the agency do so without an attorney, which makes easy-to-navigate rules and procedures all the more important.[2] Moreover, VA has expressly (and repeatedly) declared its "commitment to provid[ing] the best service possible to veterans," 38 C.F.R. § 0.600, and it operates under a unique statutory obligation to "give the benefit of the doubt to the claimant" when adjudicating claims, 38 U.S.C. § 5107(b).

VA thus has as much incentive as *any* agency to provide clear, unambiguous guidance accessible to your average citizen. But knowing that *Auer* ensures deference so long as its regulations remain ambiguous, the agency all too often promulgates vague, unhelpful rules that it can then interpret—and re-interpret—as it sees fit in each individual case. And VA's interpretations are themselves often incompatible with the text, history, and purpose of its regulations.

The examples described below provide compelling evidence of the pernicious, pervasive effects *Auer* has had on one of the federal government's largest agencies. *See generally* U.S. Office of Pers. Mgmt., *Employment Statistics: June 2018*, https://www.fedscope.opm.gov/employment.asp. They also confirm that *Auer* is unworkable in practice. Put simply, VA is the poster child for why *Auer* is a misguided doctrine that should be overruled.

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[2] *See* U.S. Dep't of Veterans Affairs, Board of Veterans' Appeals, *Annual Report: Fiscal Year (FY) 2018* at 31 (2018), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2018AR.pdf.

A. VA Undermines The Rule Of Law When Promulgating And Interpreting Its Own Regulations

VA regularly advances interpretations that are intentionally vague, wildly unreasonable, or inconsistent with its past positions—all the while demanding that courts defer under *Auer*. The discussion below highlights cases in which VA's interpretations were so beyond the pale as to flunk even under *Auer*. Those cases illustrate the systemic effects that *Auer*'s deference regime has had on agency rulemaking and interpretation.

1. VA Is Purposely Vague

The recent decision in *Johnson v. Wilkie*, demonstrates VA's preference for vague regulatory standards that VA can interpret however it sees fit in individual cases. 30 Vet. App. 245 (2018). There, VA tried to argue that it could deny a veteran a disability rating without even disclosing the standard under which it was operating. *Id.* at 255. VA's Board of Veterans' Appeals had denied the veteran a 50% disability rating because it found that his migraines—which struck two to three times per month—were not "very frequent," as required by the relevant VA regulation. *Id.* at 248-49. But, in making that finding, the Board did not explain how frequently the veteran's migraines had to strike before qualifying as "very frequent." Nor did any VA regulation define "very frequent."

That vagueness suited VA just fine. On appeal before the U.S. Court of Appeals for Veterans Claims (Veterans Court), VA argued that "the Board may determine whether the 'very frequent' requirement is met without disclosing what benchmark it employed

to reach that conclusion." *Id.* at 255. The court rejected that position. It found it "unacceptable . . . to be placed in the position of accepting the Board's determination that Mr. Johnson's headaches do not meet the [regulatory] requirements" on VA's ground of "'because I say so.'" *Id.* (citation omitted). Judge Allen concurred separately to "underscore [the] disturbing agency practice" illustrated by the appeal, noting that VA's conduct "undermine[d] the very system of judicial review Congress created in the [Veterans' Judicial Review Act] to protect veterans' rights." *Id.* at 255-56.

Johnson is not an outlier. In *Hood v. Brown*, the Veterans Court asked VA to explain what counts as a "[*d*]*efinite* impairment of social and industrial adaptability" under 38 C.F.R. § 4.132 (1992). 4 Vet. App. 301, 303 (1993), *vacated in part*, 7 Vet. App. 553 (1995). VA responded by noting the absence of any agency directive and indicating that a "definite" impairment refers to something between a "mild" impairment and "considerable" impairment. *Id.*

The Veterans Court rejected VA's impossibly vague "*ipse dixit* that 'definite' describes an unarticulated degree of impairment lying somewhere between 'mild' and 'considerable.'" *Id.* The court described VA's approach as "the equivalent of 'because I say so,'" likening it to Humpty Dumpty's famous assertion that "'When I use a word, it means just what I choose it to mean—neither more nor less.'" *Id.* (quoting Lewis Carroll, *Through The Looking Glass* (1865)).

An even more egregious example is *Cantrell v. Shulkin*, 28 Vet. App. 382 (2017), in which the Veterans Court asked VA to file a supplemental brief explaining how it defined the phrases "marginal

employment" and "employment in a protected environment" in 38 C.F.R. § 4.16(a). *Cantrell* Order 1-2 (Dec. 1, 2016), https://efiling.uscourts.cavc.gov/cmecf/servlet/TransportRoom?servlet=ShowDoc/01204188476. Section 4.16(a) generally provides that such employment may not be considered in assigning a veteran's total disability rating. VA's response was blunt: It refused to provide any definition whatsoever. *See Cantrell* Appellee's Resp. to the Court's Dec. 1, 2016 Order 1-2 (Dec. 16, 2016) https://efiling.uscourts.cavc.gov/cmecf/servlet/TransportRoom?servlet=ShowDoc/01204210778 (*Cantrell* Appellee's Resp.). Instead, VA argued that the regulation authorized VA to "define[]" the key terms "on a *facts-found* basis" in each particular case. *Id.* at 1 (emphasis added). VA doubled down on its standardless approach to the regulation at oral argument, where it "steadfastly maintained" that "there is no defining feature or factor . . . that guides [VA's] case-specific assessment." *Cantrell*, 28 Vet. App. at 391.

Remarkably, VA went on to explain that it had "*purposely* used *abstract* language in the regulation to allow for flexibility" in how the agency applied the regulation in different circumstances. *Cantrell* Appellee's Resp. 1 (emphasis added).

> When read as [a] whole, the plain language of the regulation therefore reflects the *Secretary's intent to be abstract in identifying when marginal employment may exist* when earned annual income exceeds the poverty threshold, *providing discretion to the Agency's adjudicators.*

Id. at 5 (emphasis added); *see also id.* at 11. Indeed, VA unabashedly trumpeted its right to be ambiguous and preserve maximum, unconstrained discretion for itself: "VA does not err when it uses abstract or even vague language in its regulations." *Id.* at 6. And of course, VA also argued that the Veterans Court should defer to the agency's position that the regulation empowered VA to decide what the regulatory terms meant on a case-by-case basis, unguided by any overarching rule or principle. *Id.* at 2, 7-8.

Thankfully, the Veterans Court in *Cantrell* saw VA's sophistry for what it was—a naked power grab. The court recognized that "[e]ssentially, the Secretary is asking the Court to defer to a 'we know it when we see it' definition." *Cantrell*, 28 Vet. App. at 390. But "absent an articulated standard . . . that is capable of consistent application," the court rightly concluded that VA's approach would lead to inconsistent and arbitrary results. *Id.* at 390-91. The court rejected VA's argument that "ambiguity by design is a beneficial feature" of Section 4.16, and it refused to defer. *Id.* at 390.

The Veterans Court ultimately got it right in *Cantrell*, but that should not obscure the fundamental problem the case illuminates: VA's response to the incentives created by *Auer* deference was *not* to faithfully and responsibly articulate clear legal standards. Rather, it was to purposely obfuscate and ambiguate—and thereby to retain, for itself, the right to say "what the law is" in each particular case. *Cantrell* is Professor Manning's nightmare scenario come to life.

2. VA Interpretations Are Unreasonable

Even when VA does advance interpretations, they are often blatantly results-oriented rather than genuine attempts to explain the meaning of the regulation at issue. VA's track record undermines any assumption that agencies should be trusted as fair and impartial arbiters of the law.

In *Johnson v. McDonald*, for example, VA had promulgated a regulation allowing veterans to ask the agency to consider criteria not captured in the ordinary schedule of disability ratings when assessing the veteran's specific case. 762 F.3d 1362, 1363 (Fed. Cir. 2014). The regulation provided that such "extra-schedular" consideration would be available where the ordinary disability schedule did not accurately capture the effect of the veteran's "disability *or* disabilities." 38 C.F.R. § 3.321(b)(1) (2012) (emphasis added). When interpreting that regulation, though, VA decided that "disability or disabilities" really meant just "disability," which allowed it to refuse to consider the combined effect of multiple disabilities. *See Johnson*, 762 F.3d at 1365.

Applying *Auer* deference, the Veterans Court concluded that it was required to defer to the agency's interpretation, even though the court itself believed that VA's interpretation hung "on the thinnest thread" and the contrary interpretation "appears clear on its face and favors the veteran." *Johnson v. Shinseki*, 26 Vet. App. 237, 251 (2013). Thankfully, the Federal Circuit subsequently overturned that decision, castigating VA for "manufactur[ing] an ambiguity in language where none exists in order to redefine the plain language of a regulation." *Johnson*, 762 F.3d at 1366.

VA's approach in *Gray v. McDonald* was similarly wrongheaded. 27 Vet. App. 313 (2015). That case involved VA's interpretation of a regulation about where a Vietnam veteran had to serve to claim a statutory presumption of herbicide exposure for purposes of establishing his right to disability benefits. *Id.* at 322. In seeking deference, VA argued that the interpretation reflected its consideration of evidence of herbicide spraying in particular areas of Vietnam. *Id.* at 324.

But when the Veterans Court actually peeked under the hood to see whether any facts supported the agency's position, it concluded that "the documents the [VA] relie[d] upon [we]re devoid of any indication that VA made a fact-based assessment of the probability of exposure in Da Nang Harbor [where Mr. Gray served] from aerial spraying." *Id.* Indeed, the court could not "discern any rhyme or reason in VA's determination" about which harbors qualified for the presumption. *Id.* The court criticized VA's interpretation as "arbitrary," "irrational," "aimless and adrift," and "inconsistent with the identified purpose of the statute and regulation." *Id.* at 322-25. It stated that VA's approach was "just as arbitrary" as "flipping a coin." *Id.* at 325.

Turner v. Shulkin provides another example. 29 Vet. App. 207 (2018). That case involved 38 C.F.R. § 3.156(b), which states that if new and material evidence is "received" before a veteran's administrative-appeal window expires, the evidence will be considered as though it was filed with the original claim. VA argued that when *VA* doctors treat a veteran and create *VA* treatment records—and when a veteran seeking disability benefits specifically identifies those records and that they are in *VA*'s

possession—VA has not actually "received" the records for purposes of Section 3.156(b). *Id.* at 212, 220. The Veterans Court rightly rejected VA's approach. For one thing, the Court explained that VA's interpretation contradicted a formal and binding opinion issued by VA's own General Counsel. *Id.* at 215-16. It also criticized the substance of VA's position as "confused at best," "certainly not well-reasoned," and contrary to "basic fairness" and "common sense." *Id.* at 216-17.

Johnson, *Gray*, and *Turner* are just representative samples of the post-hoc justifications that VA regularly tries to advance under *Auer*. This case of course presents an additional illustration. *See* Pet. Br. 55-61. But many, many other examples abound.[3] Nor is VA's track record of unreasonable interpretations—coupled with assertive demands for deference—limited to regulations. Indeed, VA's scorecard looks even worse when *Chevron* cases are

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[3] *See, e.g.*, *Ortiz-Valles v. McDonald*, 28 Vet. App. 65, 71 (2016) ("The Secretary cannot simply add restrictions to a regulation where they do not exist."); *King v. Shinseki*, 26 Vet. App. 484, 491 (2014) (holding that VA's interpretation was foreclosed by regulation's plain language because it would render entire subsection superfluous); *Bates v. Shinseki*, No. 08-1453, 2012 WL 1971327, at *6 (Vet. App. June 4, 2012) (rejecting VA's interpretation because "[t]he Secretary has provided no explanation for his position," "has cited no authority . . . to support this position," and "has not distinguished his litigation position from a mere post hoc rationalization"); *Ervin v. Shinseki*, 24 Vet. App. 318, 326-27 (2011) (rejecting VA's interpretation because VA "may not attempt to subvert the plain language of the regulation simply by adopting a litigating position contrary to it" and "Secretary fail[ed] to distinguish his litigation position from a mere post hoc rationalization"), *opinion corrected*, 25 Vet. App. 178 (2012).

factored into the mix.[4] It seems to be standard operating procedure for VA to develop regulatory frameworks that have "no basis in the relevant statutes" and do "nothing to assist, and much to impair, the interests of those the law says [VA] is supposed to serve." *Mathis v. Shulkin*, 137 S. Ct. 1994, 1995 (2017) (Gorsuch, J., dissenting from denial of certiorari).

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[4] *See, e.g.*, *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (rejecting deference to VA interpretation that "flies against the plain language of the statutory text"); *Procopio v. Wilkie*, No. 17-1821, 2019 WL 347202, at *4-5 (Fed. Cir. Jan. 29, 2019) (holding that "[n]o fair reading" could support VA's interpretation, notwithstanding agency's "primary argument . . . that *it* injected ambiguity" into statutory term); *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1338, 1346 (Fed. Cir. 2003) (VA promulgated "unreasonable" regulation that was "contrary to the statutory mandate" because it "impose[d] on claimants an arbitrary new deadline" that narrowed veterans' ability to submit evidence); *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1348-49 (Fed. Cir. 2003) (VA "impose[d] a misleading hurdle" by promulgating regulation providing that claimants had "not less than 30 days to respond to notice," despite statute providing that claimants had "one year from the date of such notification" to respond (citations omitted)); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1368 (Fed. Cir. 2001) (VA "failed to explain its rationale for interpreting . . . virtually identical statutes in conflicting ways"); *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 699 (Fed. Cir. 2000) (VA imposed heightened pleading requirements on veterans that were "contrary to" the relevant statute); *Cook v. Snyder*, 28 Vet. App. 330, 339-40 (2017) (rejecting VA argument that its regulation reasonably construed a statutory provision despite the regulation *pre-dating* that statutory provision), *aff'd sub nom. Cook v. Wilkie*, 908 F.3d 813, 818-19 (Fed. Cir. 2018) (in which VA argued that a post-remand review of a claim by the Board of Veterans' Appeals is not an "appeal"—despite the Board having jurisdiction over only appeals).

3. VA Interpretations Are Inconsistent

Even when VA correctly identifies multiple interpretations of a regulation that might be plausible, it has a penchant for switching between those interpretations from case to case without rhyme or reason. VA's inconstancy further undermines the case for deference.

In *Correia v. McDonald*, the Veterans Court addressed 38 C.F.R. § 4.59, a regulation specifying how VA medical examiners should examine veterans who suffer from disabilities involving painful physical motion. 28 Vet. App. 158, 163-70 (2016). For years, VA had interpreted Section 4.59 as providing a mandatory standard for painful-motion examinations and had conceded that remand was appropriate if a veteran's examination did not comply with the regulation. *See, e.g.*, *Davis v. Shinseki*, No. 12-2013, 2013 WL 6622931, at *4 (Vet. App. Dec. 17, 2013).[5]

But then VA suddenly and completely switched gears: It took the new position that Section 4.59's language was merely permissive, and that the regulation just gave some relevant factors that medical examiners might choose to consider when testing for painful motion—such that the failure to comply with the regulation's requirements in that case was *not* a basis for remand. The Veterans Court recognized that this interpretation was not

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[5] *See also Bartlett v. McDonald*, No. 13-1867, 2014 WL 4748597, at *2 (Vet. App. Sept. 24, 2014); *Wilson v. Shinseki*, No. 12-3246, 2014 WL 646208, at *3 (Vet. App. Feb. 20, 2014); *Franklin v. Shinseki*, No. 12-0369, 2013 WL 1897184, at *3 (Vet. App. May 7, 2013); *Womack v. Shinseki*, No. 11-0458, 2013 WL 351405, at *5-6 (Vet. App. Jan. 30, 2013); *Rango v. Shinseki*, No. 06-2723, 2009 WL 174365, at *2 (Vet. App. Jan. 26, 2009).

necessarily inconsistent with the regulation's text, which it found ambiguous. *See Correia*, 28 Vet. App. at 166. But the court nonetheless refused to defer, because the agency's failure to explain the basis for its interpretive turnabout—or even to *acknowledge* the change—made it impossible to tell what the agency's true, official interpretation of the regulation would be. *See id.* at 167-68.

In *Southall-Norman v. McDonald*, VA similarly tried to re-interpret its regulation while expecting deference. 28 Vet. App. 346 (2016). *Southall-Norman* involved the same regulation as *Correia*, but the issue was whether Section 4.59 applied to all medical evaluations involving painful physical motion or only to evaluations for diagnostic codes that specifically reference a limitation of motion. *Id.* at 348. VA regulations break disabilities down into so-called diagnostic codes; each code represents a disability and defines the criteria and symptoms required for that diagnostic code to apply. VA argued that Section 4.59 applies only when evaluating diagnostic codes that specify a limitation of motion or involve range-of-motion measurements. And VA further argued that the court should defer to VA's interpretation if it thought Section 4.59 was ambiguous on this point.

The Veterans Court rejected both arguments. It held that Section 4.59's plain terms foreclosed VA's interpretation, and it "reject[ed] the Secretary's attempts to read into the regulation a limitation to its applicability that is simply not there." *Id.* at 352. Even if Section 4.59 were ambiguous on this point, the court "still would not defer to the Secretary's proffered interpretation, because it does not reflect the agency's considered view on the matter, as he has not consistently adhered to that interpretation." *Id.* VA

had advanced, in at least three other recent cases, a position "directly contrary to" its position in *Southhall-Norman*. *Id.* at 352-53.

A final example of VA's interpretive indecision is *Hudgens v. McDonald*, 823 F.3d 630 (Fed. Cir. 2016). There, VA argued that *partial* knee-joint replacements do not qualify as knee-joint replacements under the relevant VA diagnostic code, 38 C.F.R. § 4.71a. *Hudgens*, 823 F.3d at 631-32. But that was not how VA had treated partial knee-joint replacements in the past. The court rejected VA's request that it apply *Auer* deference and "disregard the numerous inconsistent rulings" in prior adjudications. *Id.* at 638.

Hudgens is also a striking example of VA's chutzpah in invoking *Auer*. Twelve days before VA's brief in that case was due, the agency published a final informal rule to "clarify" the relevant language in Section 4.71a. *Id.* at 634 (explaining this chronology and citing *Agency Interpretation of Prosthetic Replacement of a Joint*, 80 Fed. Reg. 42,040 (July 16, 2015)). But despite seeing the need to issue this clarification, VA's brief told the court that the regulation's language was "*clear on its face*." *Hudgens* Br. of Resp't-Appellee 23, 2015 WL 4615960 (Fed. Cir. July 28, 2015) (emphasis added). As the Veterans Court explained, this chain of events made it "difficult to avoid the conclusion that the regulation is sufficiently ambiguous to lead to conflicting rulings and that [the] current agency interpretation [of Section 4.71a] was conveniently adopted to support the Veterans Court's interpretation in this case." *Hudgens*, 823 F.3d at 639. The court rightly rejected VA's "*post hoc* rationalization" and refused to defer under *Auer*. *Id.* (citation omitted).

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Any one of the cases discussed above, by itself, might not be all that telling. But taken together as a whole, they speak volumes—not just about VA, but also about the premises underlying *Auer*. These examples show that *Auer* is misguided in treating agencies as good-faith interpreters, simply unpacking and explaining what they had already meant and said in their substantive regulations. As noted, VA regularly abuses the leeway it gets under *Auer* by intentionally refusing to provide clarity; advancing opportunistic "interpretations" that are really just attempts to re-write substantive rules without the bother of notice and comment; and bouncing between positions on an arbitrary and unpredictable case-by-case basis. We suspect VA is not the only federal agency to engage in these dubious practices.

B. Hard Data Corroborates VA's Unreasonableness

Lest *amici* be accused of cherry-picking anecdotal examples above, we note that hard data confirms VA's unreasonable litigating positions. When claims actually make it out of VA's administrative maze on appeal, the agency loses—a lot. In 2017, of the 3,619 appeals to the Veterans Court that resulted in a merits disposition, only 499—13.8%—were resolved completely in VA's favor. U.S. Court of Appeals for Veterans Claims, *Annual Report: October 1, 2016 to September 30, 2017 (Fiscal Year 2017)* at 2 (2017), http://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf.

Of course, a party can lose by simply being wrong—without being unreasonable. But we know that VA *is* unreasonable in these cases from another

statistic: Of all the applications for fees and expenses under the Equal Access to Justice Act (EAJA) that the Veterans Court decided in 2017, a staggering 99.6%—2,884 out of 2,896—were granted. *Id.* This means VA did not just take an erroneous position in the cases underlying those 2,884 applications—it means VA took a position that the court deemed to be "substantially [un]justified"—which is to say, incapable of "satisy[ing] a reasonable person." 28 U.S.C. § 2412(d)(1)(A); *Pierce v. Underwood*, 487 U.S. 552, 563, 565-66 & n.2 (1988).

And 2017 was no aberration. VA did even worse in 2016. Of the 3,717 Veterans Court merits dispositions in 2016, only 457 (12.3%) were complete affirmances. U.S. Court of Appeals for Veterans Claims, *Annual Report: October 1, 2015 to September 30, 2016 (Fiscal Year 2016)* at 2 (2016), http://www.uscourts.cavc.gov/documents/FY2016AnnualReport.pdf. Granted, VA did incrementally better on EAJA applications in 2016: 2,835 out of 2,855 were granted (only 99.3%). And in 2015? On the merits, 445 complete affirmances out of 3,522 (12.6%). U.S. Court of Appeals for Veterans Claims, *Annual Report: October 1, 2014 to September 30, 2015 (Fiscal Year 2015)* at 2 (2015), http://www.uscourts.cavc.gov/documents/FY2015AnnualReport.pdf. On EAJA applications, 2,874 out of 2,910 were granted (98.8%). *Id.* at 3.

The cases and data discussed above are egregious, but they accurately reflect VA's penchant for unreasonable litigating positions. Quite simply, VA has proven unable to impartially "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). VA's track record confirms that *Auer* deference leads to opportunistic behavior and

harmful results, and that it is not a workable doctrine of interpretation. This Court should now reclaim the judiciary's constitutional and statutory authority to interpret the law.

II. THE PRO-VETERAN CANON IS A VALID TOOL OF REGULATORY INTERPRETATION

This case is almost certainly destined to become the leading precedent on the proper interpretation of federal agency regulations. It is therefore important that the Court provide guidance to lower courts and agencies on how they should decide what those regulations mean. Regardless of what the Court says about *Auer*, it should make clear that substantive canons of construction—*including the pro-veteran canon*—are valid and appropriate tools of regulatory construction.

A. The Pro-Veteran Canon Has Deep Roots In American Law And Properly Informs The Interpretation Of Regulations

During World War II, this Court instructed that a statute providing benefits to veterans "is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943); *see also Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 278, 285 (1946) (holding that Selective Training and Service Act of 1940 must be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); *Lawrence v. Shaw*, 300 U.S. 245, 249-50 (1937) (construing veteran-benefits statute in manner most favorable to veteran); 3 Norman Singer & Shambie

Singer, *Sutherland Statutes and Statutory Construction* § 60:2 n.60 (7th ed. Westlaw Nov. 2018 update) (discussing liberal construction of remedial statutes, including veteran-benefit laws).

This rule of construction—the pro-veteran canon—has retained its force in the 75 years since. *See, e.g.*, *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994) (noting "rule that interpretive doubt is to be resolved in the veteran's favor); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (noting the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 195-96 (1980). Most recently, this Court applied the canon in *Henderson ex rel. Henderson v. Shinseki* to hold that the 120-day deadline for filing an appeal with the Veterans Court is not jurisdictional but procedural. 562 U.S. 428, 441 (2011).

The pro-veteran canon accounts for Congress's special and longstanding "solicitude" for veterans. That solicitude resonates throughout our Nation's veteran-benefit laws. *See United States v. Oregon*, 366 U.S. 643, 647 (1961). For example, unlike almost every other federal agency that administers a benefits scheme, VA is obliged to help claimants develop their claims. *See* 38 U.S.C. § 5103A. Similarly, the Veterans' Judicial Review Act requires VA to "give the benefit of the doubt to the claimant" when adjudicating a claim. 38 U.S.C. § 5107(b). These provisions reflect Congress's intent to "place a thumb on the scale in the veteran's favor." *Henderson*, 562 U.S. at 440 (citation omitted). The canon works the same way, albeit in the judicial context. It functions as a tie-breaker; if all other interpretive tools leave the meaning of a provision unclear, the canon

provides that "interpretive doubt is to be resolved in the veteran's favor." *Brown*, 513 U.S. at 117-18.

By resolving doubts in the veteran's favor, the canon implements how Congress intends veteran-benefit laws be construed. Indeed, this Court has "presume[d] congressional understanding of" the pro-veteran canon and acknowledged that Congress legislates with this understanding. *King*, 502 U.S. at 220 n.9; *see also Finley v. United States*, 490 U.S. 545, 556 (1989) (noting the "paramount importance" of Congress being able to "legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts"). Congress expects that the courts—and VA—will give veterans the benefit of the doubt when facing close interpretive calls.

All the reasons that animate the pro-veteran canon's application to statutory interpretation apply with even more force to regulatory interpretation. After all, every federal agency is a creation of Congress. Agencies administer Congress's laws, and virtually every (lawful) action an agency can take is pursuant to a congressional delegation of authority. Because the canon is predicated on Congress's special solicitude for veterans, it should apply to Congress's administrative creations—including, most importantly, to VA.

Even putting congressional intent aside, applying the pro-veteran canon to VA's regulations also effectuates *VA's own* stated intent. VA's official mission statement provides that the agency's fundamental purpose is to "fulfill President Lincoln's promise '[t]o care for him who shall have borne the battle, and for his widow, and his orphan." U.S. Dep't of Veterans Affairs, *About VA: Mission Statement*,

https://www.va.gov/ABOUT_VA/index.asp (last updated Mar. 22, 2018). Similarly, VA's own regulations espouse its "commitment to provide the best service possible to veterans." 38 C.F.R. § 0.600. Applying the pro-veteran canon to the interpretation of VA's regulations holds VA to its own words and effectuates the agency's core mission. If a VA regulation is truly ambiguous, the scales *should* tip in favor of veterans.

B. The Pro-Veteran Canon Applies Irrespective Of Whether *Auer* Is Overruled

Whether or not *Auer* deference survives this case, the Court should clarify that the pro-veteran canon is an important tool that applies to the interpretation of VA regulations.

If *Auer* is overruled, the pro-veteran canon should be used like any other substantive canon of construction—as an interpretive tool that helps courts and agencies discern the true meaning of a regulation. Thus, when an ambiguity arises in a veteran-benefit regulation, the canon should place a thumb on the scale in favor of the pro-veteran interpretation. To be sure, that interpretation must give way if other interpretive tools more persuasively require a different result. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) ("Canons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction."). But the pro-veteran canon should carry significant weight in the balance. And if all other interpretive tools result in a wash, "interpretive doubt is to be resolved in the veteran's favor." *Brown*, 513 U.S. at 117-18.

If *Auer* stays on the books, the pro-veteran canon should be used in largely the same way, albeit when a court is initially deciding whether a regulation is ambiguous and deference is appropriate. That threshold determination—analogous to Step One of the *Chevron* inquiry—is crucially important. As Justice Kennedy explained, courts must avoid abandoning their interpretive role by engaging in only a "cursory analysis" at the threshold before throwing up their hands and giving "reflexive deference" to an agency. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring); *see also* Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 324 (2017) (lamenting that "in agency cases it often seems that the court pauses only briefly at [*Chevron*] step one, without much effort to hack through the undergrowth, before proceeding straightaway down the cleared path of step two").

Some laws really are ambiguous. But before deferring to an agency, courts must do the hard interpretive work necessary to determine whether the meaning of a provision is truly in doubt. Given that the pro-veteran canon is a reliable proxy for the original intent of both Congress and VA, courts should apply the canon when assessing ambiguity and deciding whether to defer under *Auer*.

That approach also makes sense in light of this Court's *Chevron* precedent. *Chevron*'s all-important Footnote Nine makes clear that the Step One inquiry involves *all* "traditional tools of statutory construction"—and that if a court applies those tools and "ascertains that Congress had an intention" on the question at issue, "that intention is the law and

must be given effect." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984); *see, e.g., SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) ("Even under *Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning." (quoting *Chevron*, 467 U.S. at 843 n.9)); *see also* Brett M. Kavanaugh, Book Review, 129 Harv. L. Rev. 2118, 2153 n.175 (2016) ("[I]f we took *Chevron* footnote 9 at face value, fewer cases would get to *Chevron* step two in the first place.").

As explained, the pro-veteran canon is undeniably a "traditional tool[] of statutory construction"—and it thus plainly applies at *Chevron* Step One. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1618 (2018) (citation omitted); *id.* at 1630 ("Where, as here, the canons [of construction] supply an answer, '*Chevron* leaves the stage.'" (citation omitted)). There is no reason it should not apply at the analogous stage of any *Auer* inquiry. After all, "[a] regulation is a written instrument and the general rules of interpretation apply. When a regulation is legislative in character, rules of interpretation applicable to statutes should be used to determine its meaning." 1A Singer & Singer, *supra*, § 31:6 (footnote omitted); *see generally Procopio v. Wilkie*, No. 17-1821, 2019 WL 347202, at *9 (Fed. Cir. Jan. 29, 2019) (O'Malley, J., concurring) (explaining that "the pro-veteran canon, like every other canon of statutory construction, can and should apply" at the threshold step of the *Chevron* and *Auer* inquiries).

For the reasons noted above, this Court should conclusively reject *Auer* deference and restore the interpretive authority that rightfully belongs to

Article III courts. But whether it does so or not, the Court should make clear that the pro-veteran canon is a valid tool of regulatory construction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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